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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
Interest of the Association	2
Reasons for Granting Writ	8
Conclusion	16

INDEX TO CITATIONS

CASES:

Airline Dispatchers Association, et al. v. National Mediation Board, et al., 89 U.S. App. D.C. 24, 189 F. 2d 685, 687-688 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849 ..... 10, 12, 13, 14

Airline Stewards and Stewardesses Association v. National Mediation Board, et al., 111 U.S. App. D.C. 126, 294 F. 2d 911 (D.C. Cir., 1961), *cert. den.* 369 U.S. 810 9

American Trucking Associations, Inc., et al. v. United States, 355 U.S. 141 (1957) 3

Brotherhood of Railway and Steamship Clerks v. Atlantic Coast Line R. Co., 201 F. 2d 36 (4th Cir., 1953) 9

Brotherhood of Railway and Steamship Clerks, et al. v. United Transport Service Employees of America, et al., 320 U.S. 715 (1943) 8

Brotherhood of Railway and Steamship Clerks v. Virginian Railway Company, et al., 125 F. 2d 853, 857 (4th Cir., 1942) 15

Decker, et al. v. Linea Aeropostal Venezolana, et al., 103 U.S. App. D.C. 301, 258 F. 2d 153, 154 (D.C. Cir., 1958) 9, 10

Droggos, et al. v. National Mediation Board, et al., 227 F. Supp. 61, 62 (1963) 10, 11

Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373 (1942) 3

National Federation of Railway Workers, et al. v. National Mediation Board, et al., 79 U.S. App. D.C. 16, 141 F. 2d 725 (D.C. Cir., 1944) 10

Railway Labor Executives' Association v. United States, 339 U.S. 142 (1950) 3

Page

Rose, et al. v. Brotherhood of Railway and Steamship Clerks, 181 F. 2d 944 (4th Cir., 1950) 9
Switchmen's Union of North America, et al. v. National Mediation Board, et al., 320 U.S. 297, 302, 303, 305 (1943) 8, 9, 10, 11
UNA Chapter, Flight Engineers' International Association v. National Mediation Board, et al., 111 U.S. App. D.C. 121, 294 F. 2d 905 (D.C. Cir., 1961) 9
United Transport Service Employees of America, et al. v. National Mediation Board, et al., 79 U.S. App. D.C. 15, 141 F. 2d 724 (D.C. Cir., 1944) 10
United Transport Service Employees of America, et al. v. National Mediation Board, et al., 85 U.S. App. D.C. 352, 179 F. 2d 446 (D.C. Cir., 1949) 10
Virginian Railway Company v. System Federation No. 40, 300 U.S. 515, 560 (1937) 16
WES Chapter, Flight Engineers' International Association v. National Mediation Board, et al., 114 U.S. App. D.C. 229, 314 F. 2d 234 (D.C. Cir., 1962) 9

STATUTES:

Railway Labor Act (45 U.S.C.A., Section 152, Ninth) 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15

MISCELLANEOUS:

National Mediation Board Rule 1206.5 5

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The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition for certiorari filed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and

Station Employes. The consent of all parties to the case has been obtained and such consents have been filed with the Clerk of the Court.

INTEREST OF THE ASSOCIATION

The Railway Labor Executives' Association is a voluntary unincorporated Association located in Washington, D. C., with which are affiliated twenty-three standard national and international railroad labor organizations that are the duly authorized representatives under the Railway Labor Act of the bulk of the nation's rail employees. In addition, some of these organizations are the duly authorized representatives under the Railway Labor Act of employees of various air carriers, including employees of United Air Lines, Inc. The names of these individual organizations are:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers

International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers

This Court has recognized the Association as the proper party to appear and speak for these Affiliated organizations and the member-employees. *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373 (1942); *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al.* v. *United States,* 355 U.S. 141 (1957).

The questions presented by the appeal in this case are of the utmost importance to the Railway Labor Executives' Association, the individual organizations of which it is composed, and the thousands of air line and railroad employees who have chosen such organizations as their collective bargaining representatives in labor relations arising under the Railway Labor Act.

This case arose out of an application filed with the National Mediation Board by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes invoking the services of the National Mediation Board under the provisions of Section 2, Ninth of the Act (45 U.S.C.A., Section 152, Ninth) to investigate and resolve a representation dispute among clerical employees (and other employees related by class or craft) of United Air Lines (United).

(R. 35.)[1] Respondent, Association for the Benefit of Non-Contract Employees (ABNE) sought to intervene in the representation dispute before the Board (Case No. R-3590) and at the same time requested the Board to (a) defer any election in the dispute until the Board had re-determined the composition of the craft or class of employees involved, (b) make a re-determination of the composition of the craft or class of employees involved in the dispute so as to create three separate crafts or classes, and (c) prepare and use in any representation election conducted in the dispute a form of ballot providing on its face a place for employees to vote affirmatively that there be no bargaining agent elected to represent their craft or class. (R. 11-14.) The Association also requested the Board to hold a hearing bearing on the issue of a re-determination of the composition of the craft or class of employees involved if it were unable to make such a re-determination without such additional facts (R. 12). In seeking a re-determination of the composition of the craft or class involved, the Association was asking the Board to review and change a previous formal determination made by the Board after hearings in Case No. R-1706, et al., dated January 31, 1947 (R. 57). While this request was pending before the Board, the Association informed the Board as follows with respect to its organization and objectives: (R. 111)

> "Perhaps to answer some unasked questions, these points should be made clear:
>
> 1. We are not seeking recognition as a bargaining agent; we do not want our name on the ballot.

[1] Reference is to pages of consolidated joint appendix before Court of Appeals, copies of which have been filed with the Court by petitioner.

2. We have no intention of becoming a Company union.

3. We are not sanctioned, recognized, or assisted in any way by United Airlines management.

4. Our Association will be dissolved after such time as it has served its purpose."

The Board denied the requests of the Association on the grounds that (1) the petition to intervene in the representation dispute would not conform to the provisions of Rule 1206.5 of the Board's Rules since the Association did not purport to represent the employees involved for the purposes of collective bargaining under the Railway Labor Act and did not want its name placed upon the ballot in any representation election, and (2) it was clear that the Association did not hold itself out as a representative for the purposes of collective bargaining under the Railway Labor Act and could not be considered by the Board as a bona fide participant in Case No. R-3590. The Board's letter of denial to the Association read in pertinent part as follows: (R. 17)

> "Section 2, Ninth, of the Railway Labor Act provides for certain actions by the National Mediation Board to resolve disputes among a carrier's employees 'as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act. . . .' This language implies contests between 'parties' for the right to represent the employees involved in the dispute. By your own statements, you had disavowed any intention of the ABNE to bargain collectively for the employees concerned. Under the provisions of the Railway Labor Act, therefore, the Board is unable to recognize the Association as a proper 'party in interest' in Case No. R-3590."

The Board also denied a subsequent request of the Association for reconsideration. (R. 111.)

Thereafter, ABNE brought suit in the District Court to restrain the Mediation Board from conducting any election in the craft or class of United employees involved unless the Board should (a) conduct a hearing relative to the appropriateness of the craft or class; (b) afford ABNE status as a party in interest at said hearing; and (c) offer a ballot upon which voting employees can vote for or against representation (R. 9). The District Court granted a preliminary injunction against the Board, which read as follows: (R. 132)

> "ORDERED That the plaintiff's motion for a preliminary injunction enjoining the defendant from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., [in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation shall be and the same is hereby granted,] and it is
>
> "FURTHER ORDERED That the defendant shall have one week from today's date to show cause why the preliminary injunction above granted shall not be made permanent, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 *et seq.* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

Thereafter, this injunction was made permanent (R. 170).

The decision of the Court of Appeals affirmed the District Court's order by a 2-1 vote. The majority did not write a separate opinion but simply adopted the District Court's views.[2] The impact of this decision upon the administration of the Railway Labor Act and upon the Railway Labor Executives' Association, its constituent organizations, and the employees it represents is such as to clearly give these parties a substantial interest in supporting a review of such decision by this Court. The recognition of a right by any group which disavows an intention to represent employees for the purposes of collective bargaining under the Railway Labor Act to intervene in representation disputes before the Mediation Board and to be accorded a hearing on the composition of the craft or class of employees involved opens the doors wide to consistent improper interference in labor matters among railroads and air carriers, protracted delay in the processing of applications for the investigation of representation disputes and would, as the Mediation Board found, thwart the purposes of the Railway Labor Act. The decision respecting the form of ballot which the Mediation Board must use if it decides to conduct a representation election opens the way for continuous litigation concerning the manner in which the Mediation Board performs its duties under Section 2, Ninth with consequent injury to the rights of employees seeking legitimate representation.

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[2] United Air Lines also sought but was denied the right to intervene in the Board proceeding to urge similar procedures. United's subsequent appeal (No. 17,777) from a District Court judgment dismissing its complaint was consolidated on appeal with the instant case and the District Court's judgment affirmed on the ground that United, lacked requisite standing to initiate an action to review the Board's order.

REASONS FOR GRANTING WRIT

1. The decision and judgment of the Court of Appeals is in direct conflict with this Court's decisions in *Switchmen's Union of North America, et al.* v. *National Mediation Board, et al.*, 320 U.S. 297 (1943), and *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, et al.* v. *United Transport Service Employees of America, et al.*, 320 U.S. 715 (1943). In those cases, this Court held that Federal courts did not have jurisdiction to review actions of the National Mediation Board in the exercise of its functions under Section 2, Ninth of the Railway Labor Act. In the *Switchmen's Union* case, this Court averted to the "highly controversial" nature of representation disputes, the great pains which Congress took to protect the Mediation Board "in its handling of an explosive problem" and concluded that "we cannot help but believe that if Congress desired to implicate the Federal judiciary and to place upon the Federal courts the burden of having the final say *on any aspect of the problem*, it would have made its desire plain." (320 U.S. at 302, 303.)[3]

This Court also noted that it is the clear intent of the statute that there was to be no dragging out of representation controversies into other tribunals of law (page 305). The decision below clearly implicates the federal judiciary in representation disputes, places upon the federal courts the burden of having the final say on the manner in which the Board performs its functions under Section 2, Ninth and interminably drags out representation controversies into other tri-

[3] Emphasis added.

bunals of law—all in direct contradistinction of this Court's views in the *Switchmen's Union* case. The accuracy of this Court's reasoning in the *Switchmen's Union* case is clearly borne out by the fact that the application of the Brotherhood invoking the services of the Board was filed on or about August 24, 1962 (R. 35, 36), and, although Section 2, Ninth provides that "within 30 days after the receipt of the invocation of its services" the Board shall designate the authorized representatives of the employees involved in the dispute, almost two years have gone by and the representation controversy is still in litigation. It is difficult to envisage a more direct thwarting of the basic purposes of Section 2, Ninth, or of the Railway Labor Act.

2. The decision and judgment of the Court of Appeals is directly contrary to a long line of decisions of other Federal courts, including the Court below, which followed the *Switchmen's Union* decision. *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R. Co.*, 201 F. 2d 36 (4th Cir., 1953); *Rose, et al.* v. *Brotherhood of Railway and Steamship Clerks*, 181 F. 2d 944 (4th Cir., 1950); *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 114 U.S. App. D.C. 229, 314 F. 2d 234 (D.C. Cir., 1962); *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 111 U.S. App. D.C. 121, 294 F. 2d 905 (D.C. Cir., 1961); *Airline Stewards and Stewardesses Association* v. *National Medation Board et al.*, 111 U.S. App. D.C. 126, 294 F. 2d 911 (D.C. Cir., 1961), *cert. den.* 369 U.S. 810; *Decker, et al.* v. *Linea Aeropostal Venezolana, et al.*, 103 U.S. App. D.C. 301,

258 F. 2d 153 (D.C. Cir., 1958);[4] *Airline Dispatchers Association, et al.* v. *National Mediation Board, et al.*, 89 U.S. App. D.C. 24, 189 F. 2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849; *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 85 U.S. App. D.C. 352, 179 F. 2d 446 (D.C. Cir., 1949); *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 79 U.S. App. D.C. 15, 141 F. 2d 724 (D.C. Cir., 1944); *National Federation of Railway Workers, et al.* v. *National Mediation Board, et al.*, 79 U.S. App. D.C. 16, 141 F. 2d 725 (D.C. Cir., 1944).

In addition, the decision of the Court of Appeals is in direct conflict with a recent decision reached by the United States District Court for the Northern District of Ohio, Eastern Division, in *Droggos, et al.* v. *National Mediation Board, et al.*, 227 F. Supp. 61 (1963) which refused to accept the decision of the District Court for the District of Columbia. The *Droggos* case involved an action under the Railway Labor Act to restrain the Mediation Board from conducting a representation election among the employees of Lake Central Airlines unless it used a ballot permitting an affirmative vote for "No Union". The United States District Court for the Northern District of Ohio held that it did not have jurisdiction to review the action of the Mediation Board and to grant the requested relief. In reaching this decision, that Court had before

[4] In the *Decker* case, paragraph 8 of the complaint in the District Court raised the identical question here involved of the form of ballot used by the National Mediation Board in representation elections and the appeal from the District Court's decision dismissing the complaint specifically raised the issue. The Court of Appeals held that under such circumstances, the prohibition in the *Switchmen's Union* case is applicable (258 F. 2d at 154).

it the decision of the United States District Court for the District of Columbia Circuit in the present case but declined to follow that decision on the grounds that it was contrary to this Court's holdings in the *Switchmen's Union* case. On this point, the Ohio District spoke as follows: (page 62)

> "Despite a contrary holding in Association for the Benefit of Non-contract Employees v. National Mediation Board, 218 F. Supp. 114, D.C., (1963), it is my view that no constitutional right, nor any fundamental right has been denied to the plaintiffs. I find that the Board, in selecting the form of ballot, was exercising the discretion committed to it by the statute to establish the rules to govern the election. This discretionary action is not reviewable under Switchmen's Union of North America v. National Mediation Board, supra, General Committee of Adjustment of Brotherhood of Locomotive Engineers etc. v. Missouri-Kansas-Texas Railroad Co., 320 U.S. 323, 64 S. Ct. 146, 88 L. Ed. 76 (1943), and Rose v. Brotherhood of Railway and Steamship Clerks, supra. The statute contemplated affirmative action by the Board rather than negative action which would be against representation. If the Board used a method of obtaining the choice or desires of the employees concerned which bore a reasonable relation to the discretionary power vested in it, I think the court is not authorized to interfere."

3. The decision and judgment of the Court of Appeals erroneously decides an important question of Federal law in the administration of the Railway Labor Act.

At the time the present controversy arose, the National Mediation Board had behind it a record of more than 30 years in the handling of representation dis-

putes pursuant to Section 2, Ninth of the Railway Labor Act. During this period the Board had used ballots which did not provide a place thereon for an employee to affirmatively vote "No Union". The Board had pursued such a policy and it denied the request in the present dispute to change that policy because, in its view, the inclusion of a box upon a ballot to affirmatively vote against representation "would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees." (R. 87.) This consistent policy of the Board in the administration of its duties under Section 2, Ninth has been formally published (R. 161) and yet Congress did not amend the statute in any way. In spite of this long prevailing practice and the well established precedents against judicial review of Mediation Board actions under Section 2, Ninth the Court of Appeals reversed the Board's action without even an opinion setting forth the majority's reasons for such action. The majority simply adopts the opinion of the District Court.

A review of the District Court's opinion shows that it was based on that Court's interpretation of the decision in *Airline Dispatchers Association* v. *National Mediation Board,* 189 F. 2d 685 (1951), *cert. den.* 342 U.S. 849, and the application of that decision to the facts in this case. The decision of the Court of Appeals in the *Dispatchers* case permitted a judicial determination of the question of whether the Railway Labor Act had extra territorial application so as to permit the National Mediation Board to certify a collective bargaining representative for employees of domestic air carriers permanently based outside of this

country. Thus, the isscue presented was not the manner in which the Mediation Board had performed its duties under Section 2, Ninth of the Railway Labor Act, but whether or not the Board had any power to act at all under that Section. The Court of Appeals in the *Dispatchers* case clearly recognized the distinction between judicial review of the question of statutory power and review of Board decisions relating to the manner in which the Board performs its functions in cases where it admittedly has authority to act. Thus, the Court of Appeals referred to the long line of cases holding that there was no judicial review of the manner in which the Board performs its duties under Section 2, Ninth and then spoke as follows: (189 F. 2d 687-688)

> "In each of these cases the Board had chosen between alternate methods of settling a dispute over representation under Section 2, Ninth, of the Act. The question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner. The case now before us is quite different. Here there has been a refusal to take any action to resolve the dispute, upon the view that Congress has not extended the powers of the Board to an employer and its employees geographically situated as are these disputants; that is, outside the continental United States and its territories. This in no sense is Board action within the framework of Section 2, Ninth, or, indeed, within any other of the provisions of the Act for administrative resolution of industrial-labor disputes. This is a different 'type of problem' (320 U.S. at page 301, 64 S. Ct. at page 97, 88 L. Ed. 61)."

The complaint in the present case clearly did not present any question of the statutory power of the

Board to act and should have been dismissed under the *Dispatcher* decision. It sought review only of the Mediation Board's manner of investigating a representation dispute over which the Board admittedly has jurisdiction, under Section 2, Ninth.

First: the complaint raised questions as to the refusal of the Mediation Board to conduct hearings at the request of the ABNE at which ABNE would be a party to redetermine the compostion of the craft or class involved. The Board exercised its discretion not to reconsider the composition of the craft or class which it had previously established. (R. 14, 26.) The District Court overturned this Board action and directed the Board to reconsider its refusal to reopen the craft or class question. (R. 170.) This situation presents a classic example of judicial interference with the manner in which the Board investigates and determines a representation dispute under Section 2, Ninth.

Second: the complaint raised questions as to the refusal of the Mediation Board at the request of ABNE to abandon the type of ballot used by the Mediation Board for more than thirty years in some 3400 representation elections and substitute a form of ballot requested by the Association which would contain a box for voting "no representation". (R. 8, 161.) The District Court ordered the Board to use such a ballot. Here again this constituted clear judicial interference with a determination by the Mediation Board as to the manner in which it should investigate and determine representation disputes. Section 2, Ninth does not prescribe any procedure for the Board to follow in determining such a dispute. The Board may choose any procedure which in its judgment is best suited to performance of its duties in the particular dispute.

It is not required to conduct a representation election. *Brotherhood of Railway and Steamship Clerks* v. *Virginian Railway Company, et al.*, 125 F. 2d 853 (4th Cir., 1942). In that case, the Fourth Circuit stated: (page 857)

> "Whether a secret election rather than a checking of authorization cards against company records is a more desirable method of determining the bargaining representative of employees in any particular case, is a matter which the law has confided to the discretion of the Mediation Board and not to the courts."

It would seem clear that if the Board is not required to conduct a representation election as a part of its investigation of a representation dispute, it then has discretion as to the form of ballot used in cases where it does decide to use this procedure. However, the District Court held that if the Mediation Board does conduct a representation election it must conform to the requirements of the statute. What requirements? There are none. If they can be established by judicial order, then so can similar requirements be established for any other actions taken by the Board under Section 2, Ninth and the Congressional intent to leave the administration of this statutory provision to the Board is destroyed. In its place there is established judicial concepts of what is appropriate in any given instance.

The controversy obviously lacked equitable considerations justifying judicial intervention. ABNE claimed representation of, or the authority to speak on behalf of, a majority of the employees involved. It was apparent to it that if such majority did not participate in the election, no bargaining agent would be

certified, thus achieving its objective. Respondent in correspondence to the Board obviously understood that the casting of "invalid" (blank or otherwise) ballots, or the failure of a majority to cast valid ballots (or any ballots at all) would result in no certification. Such action if undertaken by its members, respondent said, did not "appear" to it "to faithfully reflect the democratic process." (R. 109) Consideration of sound equitable principles might well have persuaded the lower court to refrain from interference with administrative procedures used by the Board to resolve in excess of 3400 representation disputes, simply to require conduct in accord with what respondent conceived to be a desirable or more "democratic" procedure.. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 560 (1937). Judicial intervention by the lower court was unnecessary, ill-advised, and erroneous, and the impact of its decision if unchecked will reverse progress in the prompt and orderly settlement of labor relations disputes to a degree far over-shadowing the advantages that may be realized by a procedurally-inspired group of employees otherwise capable of self-help.

CONCLUSION

For the foregoing reasons, the petition of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes for a writ of certiorari should be granted.

Respectfully submitted,

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